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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL VASQUEZ,

Defendant and Appellant.

F054792

(Super. Ct. No. VCF184787)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Ronn M. Couillard, Judge.

Curt R. Zimansky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Brian Alvarez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Wiseman, Acting P.J., Dawson, J. and Hill, J.

FACTUAL AND PROCEDURAL HISTORIES

Pursuant to a negotiated plea agreement, appellant Juan Manuel Vasquez entered a no-contest plea to driving with a blood alcohol level of .08 or more and causing injury (Veh. Code, § 23153, subd. (b)), leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), and driving with a suspended license (Veh. Code, § 14601.1, subd. (a)). He also admitted that he caused great bodily injury to the victim, 64-year-old Mary Torres, (Pen. Code, § 12022.7, subd. (a)), and that he caused bodily injury to more than one victim, Mrs. Torres and her passenger (Veh. Code, § 23558). The convictions resulted from a motor vehicle accident in which Vasquez, driving under the influence of alcohol with a blood alcohol level of .22 percent, crossed over the double yellow lines and collided with the vehicle driven by Mrs. Torres. Vasquez ran from the scene. Mrs. Torres suffered a fractured ankle, which rendered her unlikely to walk again. Her passenger suffered injuries to her face and knee.

At sentencing, the trial court stated it felt an upper term was the more appropriate term. Vasquez was then sentenced to a total of six years in state prison as follows: the upper term of three years for driving with a blood alcohol level above .08 and causing injury; a consecutive three-year term for the great bodily injury enhancement; and a concurrent three-year upper term for leaving the scene of an accident. He was sentenced to 180 days with credit for time served on the last count, driving with a suspended license. The Vehicle Code section 23558 enhancement was ordered stricken.

DISCUSSION

Vasquez contends on appeal that the trial court improperly used the injury to Mrs. Torres to support both the great bodily injury enhancement and the imposition of the upper term. Penal Code section 1170, subdivision (b), prohibits the sentencing court from imposing an upper term by using a fact which supports any enhancement upon which sentence is imposed under another provision of law. (§ 1170, subd. (b); see also Cal. Rules of Court, rule 4.420(c); *People v. Coleman* (1989) 48 Cal.3d 112, 165 [trial

court may not use fact of great bodily injury both to impose upper term for the crime and to impose enhancement]; accord, *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1735.) The issue has been preserved for appeal.

The trial court found a number of factors in mitigation: (1) a plea was entered early in the proceedings; (2) Vasquez had no prior DUI convictions; and (3) Vasquez's two prior felony convictions were unrelated to the current conviction. Although the court characterized the factors in aggravation as "singular," it identified two separate factors: the serious nature of Mrs. Torres's shattered ankle and the impact that the injury has had upon her life. The court stated that "the seriousness and impact [of the injury] *are* of such a nature that *they* predominate and overcome any mitigating factors here." (Italics added.) This is the reasoning provided for choosing the upper term.

When an appellant claims that the trial court impermissibly used a fact as both an enhancement and an aggravating factor, the reviewing court looks at whether the trial court could have based the aggravating factor on evidence other than the evidence supporting the enhancement. If so, the sentence may stand. If not, the trial court could only have based the aggravating factor on the evidence supporting the enhancement, and the sentence must be reversed. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775.) In this case, there was evidence that the impact of the injury upon the elderly Mrs. Torres was especially significant because the injury robbed her of her independence—she can no longer walk on her own and is in constant pain. She told the court, "I can't go do shopping or anything on my own. I did this all. I won't be able to be with my grandchildren, enjoy their lives like I used to." This evidence goes beyond the medical evidence establishing the serious nature of her injury, i.e., the broken ankle requiring surgery and the insertion of pins. Although the impact on the victim's life is not one of the enumerated factors in aggravation found in California Rules of Court, rule 4.421, the sentencing court may consider aggravating circumstances not set forth in rules or statutes, so long as such aggravating circumstances are "reasonably related to the decision being

made.” (Cal. Rules of Court, rule 4.408(a).) The severe debilitating impact of the injury on the elderly victim in this case provides a separate factor supporting the imposition of the upper term and reasonably relates to the sentence choice made in this case. There is no abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 [sentencing choices reviewed for abuse of discretion].)

DISPOSITION

The judgment is affirmed.